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March 14, 2014

BY ELECTRONIC MAIL AND HAND DELIVERY

The Honorable Shira A. Scheindlin
United States District Judge
Southern District of New York
Daniel Patrick Moynihan Courthouse
500 Pearl Street, Room 1620
New York, New York 10007-1312

Re: Master File C.A. No. 1:00-1898 (SAS), M21-88, MDL No. 1358
Defendants' Pre-Conference Reply Letter for March 19, 2014 Conference

Dear Judge Scheindlin:

Defendants respectfully submit this reply letter ahead of the March 19, 2014 conference.[1]

PLAINTIFFS' AGENDA ITEMS

I. *Puerto Rico:* Plaintiffs' Motion to Compel Tauber & Tauber's Motion to Dismiss

To the extent Plaintiffs' agenda item No. 1 is not mooted by the Court's endorsed order setting a briefing schedule on Tauber's motion to dismiss, Tauber requests that the Court deny Plaintiffs' discovery motion and not refer the issue to the Special Master. Plaintiffs have not demonstrated a basis for asserting that additional documents exist, what those documents might say, or how they relate to the issue of jurisdiction or any material issue in this case.

II. *Puerto Rico*: Defendants' Designation of Rule 26(a)(2)(C) Experts

The Court has seen this before. Plaintiffs throw out an inflamatory number, proclaim that it is too high, and seek to arbitrarily limit Defendants' efforts to defend the case. Here, Plaintiffs allege that Defendants have "designated over seventy-five (75) experts, including … FRCP 26(a)(2)(C)" witnesses, and speculate that the total number could "easily exceed 100" when

[1] Defendants respectfully request a short extension of the three-page limit for reply letters.

Defendants designate their site-specific 26(a)(2)(C) witnesses. *Pls. Ltr.* at 2. First, Defendants' dispute the total number.[2]

Second, including Defendants' 26(a)(2)(C) witnesses in this "expert count" is misleading. Most of these witnesses are, first and foremost, fact witnesses for the defendant companies. They will testify about, *inter alia*, Defendants' knowledge of the properties of MTBE, the efficacy of UST technology, and methods for groundwater remediation. Many of these witnesses authored documents on these topics that Plaintiffs will seek to use in trial. Their testimony necessarily includes opinions on scientific issues because the relevant issues and documents are scientific in nature. Therefore, under the Court's clear guidance, Defendants have designated them as Rule 26(a)(2)(C) witnesses. *See Dec. 11, 2008 Conf. Tr.*, at 16-17 (at Ex. A).

The Court provided additional guidance on designation of Rule 26(a)(2)(C) witnesses in *New Jersey*. There, Plaintiffs also alleged that Defendants' number of designated witnesses was too high and the issue was addressed at the April 2013 conference. Defendants are well aware of the Court's guidance from that conference, and took it into account when making designations in *Puerto Rico*. *See Apr. 10, 2013 Conf. Tr.*, at 42:13-16 (at Ex. B) (discussing number of designated witnesses per defendant: "THE COURT: The 21 sounds too high. The 17 sounds too high. Could you folks try to get down to the same ten as ConocoPhillips…."). In contrast to *New Jersey*, in *Puerto Rico* fourteen defendants have designated a total of just thirty-five (35) Rule 26(a)(2)(C) witnesses – on average, less than three per defendant.

Third, Plaintiffs complain that the number of witnesses is problematic because they will not be able to complete depositions by the close of discovery. First, this is a non-issue as to many of the witnesses, who have already been deposed (some more than once and some even cross examined in MTBE trials) on the very topics for which they have been designated. Second, given the experience in *New Jersey* and the number of Defendants they sued here, Plaintiffs should have anticipated (and apparently did)[3] the number of 26(a)(2)(C) witnesses that could be involved (although the numbers here are very different than *New Jersey*). Furthermore,

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[2] Defendants have collectively designated 35 retained expert witnesses. (Defendants do not take Plaintiffs to be complaining about those witnesses – subject to the issues raised in agenda item No. 3.) That number includes both joint defense experts and experts for individual defendants. It also, on certain topics, includes a second expert to address issues unique to Puerto Rico that are not covered by our usual experts. Furthermore, Plaintiffs received our non-site-specific and site-specific designations of retained witnesses on August 2, 2013 and January 8, 2014, respectively. Having waited months to raise the issue, to now complain about numbers after Defendants have spent time and money preparing expert reports, is prejudicial and Plaintiffs' should be estopped from making this argument.

[3] *See Email from M. Axline to L. Gerson* (Nov. 13, 2013) (at Ex. C) (suggesting early April deadline for disclosure "in light of the number of such witnesses that were disclosed by defendants in the NJ case.").

Plaintiffs' concerns about the time left to depose these witnesses are unfounded, and to the extent there is an issue, it is a "problem" of their own creation. When the parties were discussing the schedule for these designations, Defendants accepted Plaintiffs' proposal that, "based in part on our experience in New Jersey, … it would be more efficient to all concerned if we disclose such witnesses after receiving expert reports" issued by retained experts. *Email from M. Axline to L. Gerson* (Aug. 19, 2013) (at Ex. D). The delay caused by this request was then compounded by Plaintiffs' multiple requests for expert-related extensions. Defendants have repeatedly expressed the concern that such extensions would unduly limit the time available for depositions, but granted the requests as a matter of professional courtesy. Defendants should not now be prejudiced for extending those courtesies to Plaintiffs.

Finally, Defendants believe that we have provided more than adequate summaries based on the applicable rules and the precedent established by the parties in the *New Jersey* matter. However, we have invited Plaintiffs to identify for us any witness disclosures they believe are not adequate. *See Ltr. from L. Gerson to V. Cardenas* (Mar. 13, 2014), at 3 (at Ex. E). At minimum, Plaintiffs' request for relief is premature until Plaintiffs specifically identify which witness disclosures are improper and discuss the same with the appropriate Defendant(s).

III. ***Puerto Rico*: Defendants' Designation of Certain Retained Experts**

As an initial matter, Defendants object to Plaintiffs' attempt to exclude expert witnesses through an informal process of pre-conference letter writing. The Court should deny Plaintiffs' requested relief not only because their position lacks merit, but also because Plaintiffs have not followed the proper procedure to obtain the extraordinary relief of striking Defendants' experts. If the Court is inclined to consider the merits of Plaintiffs' request, there should be full briefing.

Plaintiffs argue that three of Defendants' experts, Mr. Thomas Austin, Dr. S. Kent Hoekman and Mr. Richard Wilson, provide opinions on irrelevant topics. As demonstrated below, Plaintiffs' arguments are based on a statement made by the Court during a telephonic hearing on a discrete issue; Plaintiffs' misunderstanding of Defendants' arguments; and, apparently selective memory as to the claims they have brought against Defendants – most notably, strict liability for defective design, negligent design, and negligent sale of gasoline containing MTBE. *Third Am. Comp.* ¶¶ 96-107, 130-143.

First, the Court's very brief colloquy with counsel during the October, 22, 2013 telephonic hearing – convened to address Plaintiffs' service of 122 deposition notices on the eve of the close of fact discovery[4] – is misguided. During that hearing, the Court ruled only that Defendants could not proceed with the Rule 30(b)(6) deposition **of the Commonwealth** on

[4] Plaintiffs' statement that the October telephonic hearing was held to address "Defendants' excessive deposition notices" is a clear example of revisionist history. However, to streamline resolution of all deposition issues, the Court did also hear Plaintiffs' objections to certain Defendant-issued 30(b)(6) notices. The schedule for pre-hearing letters did not permit replies.

issues contained in the notice on Air Quality – nothing more. *Oct. 22, 2013 Tel. Hrg. Tr.* at 14:21-15:8 (at Ex. F). Further, the Court acknowledged that the issue had not been briefed by Defendants. *Id.* at 13:15-19. Plaintiffs' attempt to characterize that ruling as the equivalent of a successful motion *in limine* is incorrect.

Second, Plaintiffs misunderstand and mischaracterize these experts' opinions. Plaintiffs suggest that a cost/benefit analysis of MTBE vs. lead is not relevant. *Pls.' Ltr.* at 3. Indeed, that is not the issue. Defendants agree that the gasoline industry was required to remove lead by a certain date.[5] Defendants do not offer an expert to say that a cost/benefit analysis of MTBE vs. lead concluded that MTBE was the better choice after lead was already phased out. However, the reasons that necessitated the lead phase-out and led to the eventual use of MTBE as an octane enhancer are extremely relevant to explain to the jury **why** MTBE was added to gasoline in the first place – *i.e.*, prior to the promulgation of oxygenated and reformulated fuel regulations, MTBE was added to gasoline to replace octane levels lost from the phase-out of lead. In a case where Plaintiffs are alleging that gasoline with MTBE was a defectively designed product (based on strict liability and negligence), Defendants are entitled to explain their decisions to add MTBE to gasoline in the first place. Lead is part of that story, and Plaintiffs' expert Dr. Fogg apparently agrees.[6] *See Pls.' Expert Dr. Fogg Rpt.*, at 43 (at Ex. G) ("MTBE usage as an octane booster grew in the early 1980's in response to the phasing out of lead from gasoline[.]")

As to the MTBE versus ethanol story, this is certainly an aspect of Defendants' defense to the strict liability and negligent design claims. Plaintiffs' claim that ethanol is irrelevant because Puerto Rico was not an RFG area is a red herring. Plaintiffs allege that Defendants were negligent in selling gasoline with MTBE in Puerto Rico (*Third Am. Compl.* ¶ 131), Defendants are entitled to explain why MTBE was in some of the gasoline supplied to the island. The RFG program and ethanol are part of that story. Indeed, Plaintiffs' expert agrees. *See M. Moreau Generic Rpt.*, at IV-1 (at Ex. H) ("In contrast, ethanol, another compound that can be used as a fuel oxygenate, biodegrades rapidly. For this reason, even though ethanol is completely miscible in water, it does not pose nearly as great a threat to groundwater quality as MtBE."); *see also id.* at IV-32, IV-41, IV-49. Likewise, in a design defect case the Plaintiff must show that there was a safer, feasible alternative design. Defendants are entitled to counter that argument by explaining why – given the market for gasoline and the federal regulations on gasoline – it was

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[5] Plaintiffs state that the issue also is irrelevant because the lead phase-down began in 1986 and concluded in 1995; therefore, lead was not an issue during the "relevant time period." *Pls.' Ltr.* at 3. Plaintiffs have always insisted the relevant time period for MTBE litigation begins in 1979.

[6] Contrary to Plaintiffs' assertion, the Court did not rule that "lead is just not an issue in this case." *Pls. Ltr.*, at 3. Instead, the Court stated as an introduction and before hearing from Defendants: "I read the plaintiffs letter. I don't know that I really have a response to it, so to speak, because you had so many issues to raise in the defense letter. But **judging solely from the plaintiffs' letter** this issue about lead is just not an issue in this case." Ex. F, at 13:15-19 (emphasis added). Then, as now, Plaintiffs misunderstood the purpose for the evidence on lead.

not always feasible to supply non-oxygenated gasoline to Puerto Rico. The RFG program and issues with ethanol help explain why MTBE was used.

Finally, Plaintiffs contend that air quality benefits of MTBE are irrelevant. But as explained above, the reasons why some Defendants added MTBE to gasoline are relevant, and those reasons include MTBE's air quality benefits. It does not matter that some Defendants did not make an individual decision to include MTBE in gasoline sold to Puerto Rico (some did, and have the right to explain why). These are national and international companies. They make decisions about formulating their products and then they sell those products to hundreds of markets. When the product arrives in Puerto Rico we cannot suddenly ignore the design and decision-making process that occurred elsewhere. In addition, the jury is entitled to hear the opinions of the Defendants' experts as to whether the MTBE gasoline that was sold in Puerto Rico provided an air quality benefit to the people of Puerto Rico.

DEFENDANTS' AGENDA ITEMS

II. *Puerto Rico*: Defendants' Request for an Order on Authentication of Documents

Defendants have provided comments to Plaintiffs on their latest proposal, and the parties will continue to meet-and-confer next week in the hopes of submitting a joint stipulation.

***

As always, we appreciate your Honor's attention this matter and ask that this letter be docketed by the Clerk's Office so that it is part of the Court's file.

Sincerely,

Peter John Sacripanti

Peter John Sacripanti

cc: All Counsel of Record by LNFS, Service on Plaintiffs' Liaison Counsel

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

IN RE: METHYL TERTIARY BUTYL ETHER ("MTBE") PRODUCTS LIABILITY LITIGATION

00 MDL 1358
Master File C.A.
No. 1:00-1898(SAS)

----------x

New York, N.Y.
December 11, 2008
2:20 p.m.

Before:

HON. SHIRA A. SCHEINDLIN

District Judge

APPEARANCES

WEITZ & LUXENBERG, P.C.
Plaintiffs' Liaison Counsel
ROBERT J. GORDON

MILLER AXLINE & SAWYER
Attorneys for Plaintiff Quick v. Shell
BY: MICHAEL AXLINE

NAPOLI BERN RIPKA, L.L.P.
Attorneys for Plaintiffs
BY: MARC JAY BERN
WILLIAM J. DUBANEVICH

SHER LEFF LLP
Attorneys for City of New York
VICTOR M. SHER

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
Attorney for City plaintiffs
SCOTT PASTERNACK

Putting all that aside, you are saying they are still experts. Why shouldn't they be named when experts are named?

MR. PARDO: 26(a)(2) -- I don't want a report -- requires us to be told who they are.

THE COURT: Now, Mr. Pasternack that makes sense.

MR. PASTERNACK: The key issue here is whether or not they are experts. They have couched this as though they were experts.

THE COURT: You decide. I will make it very simple. If they are going to say "in my opinion," they are experts. So if they are going to say "in my opinion," then I advise you to disclose them on the expert schedule -- don't worry about reports, no reports because they are employees who are not specially retained under Rule 26. But if they are going to say "in my opinion" then you should disclose them on the expert schedule. And if you wait until 30 days before trial on the ordinary witness list, then they can be fact witnesses or whatever the in word is these days, but they are not going to say the words "in my opinion."

MR. PASTERNACK: I guess the issue is between 701 and 702. And the fact that we are also looking at actually making our witness list known two and a half months before as opposed to a month before, why that is not sufficient time --

THE COURT: Because the experts have a schedule, and

if they are going to give expert testimony -- which they are

welcome to do -- your present or in fact former employees, for that matter, may have expertise.

Your present or former employees, Mr. Pardo, may have expertise. There is nothing wrong with their being an expert.

I realize that the rules on the report may be different, but they should be disclosed during the time period that experts are disclosed because experts are subject to Daubert motions and all of the rest of the qualifications. So I don't see the big problem. You are preparing to go to trial. Think about it. If you want to call a present or former employee -- former employee is probably going to be retained expert -- but a present employee, just put that person in your mind in the expert bag even if you don't do a report.

MR. PASTERNACK: There is an issue later regarding whether some testimony offered was offered by the City as 701 testimony as opposed to 702. We have to address that when we get to that.

THE COURT: I guess so. I would err on the side of disclosing the person as an expert and not play games and risk being precluded. Rather than risk being precluded, I would play it safe.

MR. PASTERNACK: Thank you, your Honor.

EXHIBIT B

D4A8MTB1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

IN RE: METHYL TERTIARY BUTYL ETHER ("MTBE") PRODUCTS LIABILITY LITIGATION

00 MDL 1358
Master File C.A.
No. 1:00-1898(SAS)

----------x

April 10, 2013
4:55 p.m.

Before:

HON. SHIRA A. SCHEINDLIN,

District Judge

APPEARANCES

WEITZ & LUXENBERG, P.C.
Plaintiffs' Liaison Counsel
BY: WILLIAM A. WALSH

MILLER, AXLINE & SAWYER P.C.
Attorneys for Puerto Rico and New Jersey Plaintiffs
BY: MICHAEL AXLINE

LAW OFFICES OF JOHN K. DEMA, P.C.
Attorneys for New Jersey, Puerto Rico Plaintiffs
BY: NATHAN SHORT

COHN LIFLAND PEARLMAN HERRMANN & KNOPF, LLP
Attorneys for New Jersey Plaintiffs
BY: LEONARD Z. KAUFMANN

McDERMOTT, WILL & EMERY LLP
Attorneys for Defendants ExxonMobil Corp. and defendants' liaison counsel
BY: JAMES A. PARDO
STEPHEN J. RICCARDULLI
LISA A. GERSON

MR. CONDRON: A lot of them are for people, as Mr. Riccardulli described, may be dealing with issues like the decision to use MTBE --

THE COURT: I don't need 17 of those.

MR. CONDRON: They're not all on that issue, necessarily, your Honor.

THE COURT: Seventeen sounds high. Twenty-one sounds high. Where did I leave off on the 21?

MR. RICCARDULLI: Well, five consultants --

THE COURT: We got down to 21. Why do we have 21?

MR. RICCARDULLI: Again, your Honor, it's for three different companies over the 30 years in this case.

THE COURT: Still sounds too high. The 21 sounds too high. The 17 sounds too high.

Could you folks try to get down to the same ten as ConocoPhillips, and get rid of all the fat, get rid of all the overlap, get down to ten each. We may have solved this problem, particularly with the ruling about consultants and getting this down to ten, take a look at the ten and understand it. That's it.

MR. RICCARDULLI: We can do that, your Honor.

MR. AXLINE: Your Honor.

THE COURT: Mr. Axline.

MR. AXLINE: I'm sorry to interrupt, but I think I have to surface an issue based on something that

EXHIBIT C

Chang, Haeji

From: Mike Axline <maxline@toxictorts.org>
Sent: Wednesday, November 13, 2013 2:35 PM
To: Gerson, Lisa
Cc: Miller, Axline & Sawyer
Subject: Proposed expert protocol for PR

Importance: High

Lisa

We have reviewed the proposed expert protocol for PR and we are OK with all provisions except those having to do with the provision in Section IV having to do with defendants' site specific Rule 26(a)(2)(C) witnesses. Your proposed disclosure date of April 24 is too close to the expert discovery cutoff of May 5, particularly in light of the number of such witnesses that were disclosed by defendants in the NJ case – if you can agree to move that date back to April 2 or 3 I think we can take the item off of the agenda for the next CMC.

Mike

EXHIBIT D

Chang, Haeji

From: Mike Axline <maxline@toxictorts.org>
Sent: Monday, August 19, 2013 2:11 PM
To: Gerson, Lisa; 'Scott Kauff'
Cc: 'Will Petit'; MDL1358; Miller, Axline & Sawyer
Subject: RE: PR: FRCP 26(a)(2)(C) Witness Disclosures

Lisa

While we appreciate the idea of looking to New Jersey with respect to how to handle Rule 26(a)(2)(C) witnesses, we believe, based in part on our experience in New Jersey, that it would be more efficient to all concerned if we disclose such witnesses after receiving expert reports. We therefore propose that the CMO be amended to provide that Rule 26(a)(2)(C) witnesses, along with short summaries of their expected testimony, be designated and disclosed no later than 30 days after filing of expert reports addressing the topics on which the Rule 26(a)(2)(C) witness may testify.

Mike

From: Gerson, Lisa [mailto:LGerson@mwe.com]
Sent: Friday, August 16, 2013 8:46 AM
To: maxline@toxictorts.org; Scott Kauff (skauff@lojkd.com)
Cc: Will Petit (wpetit@jgdpc.com); MDL1358
Subject: RE: PR: FRCP 26(a)(2)(C) Witness Disclosures

Counselors,
We have not received a response regarding the below proposal. Please let us know Plaintiffs' position by Monday. Thank you,

Lisa A. Gerson
McDermott Will & Emery LLP
340 Madison Avenue
New York, NY 10173
Tel: 212-547-5769
Fax: 646-224-8675

From: Gerson, Lisa
Sent: Tuesday, July 30, 2013 1:18 PM
To: maxline@toxictorts.org; Scott Kauff (skauff@lojkd.com)
Cc: Will Petit (wpetit@jgdpc.com); MDL1358
Subject: PR: FRCP 26(a)(2)(C) Witness Disclosures

Mike & Scott,
The current scheduling CMO, No. 110, does not include a date for the disclosure of witnesses who may present expert opinion testimony at trial but who are not required to prepare an expert report (hereinafter "FRCP 26(a)(2)(C) Witnesses"). We note that Plaintiffs did not designate any such witnesses on July 19—their date to designate non-site-specific experts. It is not clear to Defendants whether that is because Plaintiffs have no such witnesses to designate or because Plaintiffs are operating under the assumption that another deadline exists. To remedy that uncertainty,

Defendants propose a schedule similar to that which was adopted in the *New Jersey* matter (CMO 106). Specifically, Defendants propose the following: (1) the parties designate FRCP 26(a)(2)(C) Witnesses, with a brief description of the subject matter on which the witness is expected to present testimony, not later than 30 days after the deadlines set forth in CMO 110 for the designation of the corresponding experts (e.g. Plaintiffs'/Defendants' non-site-specific/site-specific experts); (2) the parties disclose a summary of the facts and opinions to which the FRCP 26(a)(2)(C) Witnesses are expected to testimony not later than 30 days after the deadlines set forth in CMO 110 for the service of reports from the corresponding experts; (3) the parties produce reliance materials reviewed by the FRCP 26(a)(2)(C) Witnesses who are disclosed pursuant to the schedule above no later than five business days after the summary of facts and opinions of such witness's testimony is disclosed.

Please let us know if you would like to discuss.
Thank you,

Lisa A. Gerson
McDermott Will & Emery LLP
340 Madison Avenue
New York, NY 10173
Tel: 212-547-5769
Fax: 646-224-8675

EXHIBIT E

McDermott
Will & Emery

Boston Brussels Chicago Düsseldorf Frankfurt Houston London Los Angeles Miami
Milan Munich New York Orange County Paris Rome Seoul Silicon Valley Washington, D.C.
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March 13, 2014

BY ELECTRONIC MAIL AND LNFS

Victor L. Cardenas, Esq.
Jackson Gilmour & Dobbs, PC
3900 Essex, Suite 700
Houston, Texas 77027

Re: **Master File C.A. No. 1:00-1898 (SAS), M21-88, MDL No. 1358**
Commonwealth of Puerto Rico, et al. v. Shell Oil Co., et al., No. 07-CV-10470
Plaintiffs' March 7, 2014 Letter Regarding Experts

Dear Victor:

I am writing in response to your March 7, 2014 letter. You state that Defendants have identified "over seventy-five experts,"[1] including FRCP 26(a)(2)(C) witnesses, and speculate that the total could be "well over 100" after designation of site-specific 26(a)(2)(C) witnesses. We do not agree that our designations are "clearly excessive" given the number of individual parties the Commonwealth has sued, the number of topics at issue in the litigation, and the time span implicated by Plaintiffs' claims. As you know, Plaintiffs have sued more than 30 defendants covering the full range of participants in the gasoline market (*i.e.*, refiners, wholesalers, retailers, traders). Understandably, there will be differences in their positions and arguments – and therefore, expert testimony. You request that Defendants address your concerns by de-designating some unspecified number of 26(a)(2)(C) witnesses. Defendants disagree with your contentions – including that our designated experts are improperly duplicative or excessive – and, therefore, cannot agree to de-designate any witnesses at this time. Our reasons are discussed in greater detail below.

Regarding Defendants' Rule 26(a)(2)(C) witnesses, you suggest that many appear "prophylactic." As you may know, the Court has instructed parties to MDL 1358 to err on the side of over-inclusiveness when designating such witnesses. At a Court conference held December 11, 2008, at which your co-counsel Mike Axline was present, the Court stated:

[1] We disagree with this number. From our records, it appears that the defendants have designated a total of 35 FRCP 26(a)(2)(C) witnesses and 35 retained expert witnesses.

> I will make it very simple. If they are going to say 'in my opinion' they are experts. So if they are going to say 'in my opinion,' then I advise you to disclose them on the expert schedule – don't worry about reports, no reports because they are employees who are not specially retained under Rule 26. But if they are going to say 'in my opinion' then you should disclose them on the expert schedule.
>
> . . .
>
> I would err on the side of disclosing the person as an expert and not play games and risk being precluded. Rather than risk being precluded, I would play it safe.

Transcript of Dec. 11, 2008 Conf., at 17-18. It is important to note that these witnesses are, first and foremost, fact witnesses for the defendant companies. Many of the witnesses will testify about issues related to Defendants' alleged knowledge – over time – of the properties of MTBE. They may also discuss the state of UST technology over time. Indeed, many of these witnesses authored documents that Plaintiffs seek to use in trial. Their testimony necessarily includes opinions on scientific issues because the relevant issues and documents are scientific in nature. Therefore, under the Court's clear guidance, Defendants have designated them as Rule 26(a)(2)(C) witnesses.

Furthermore, your co-counsel, Mr. Axline addressed this issue with the Court last year in the context of the *New Jersey* matter. There, Plaintiffs also alleged that Defendants' designation of Rule 26(a)(2)(C) witnesses was excessive and raised the issue with the Court at the April 2013 conference.[2] Defendants are aware of the Court's guidance from the April 2013 conference, and took it into account when making our designations in the *Puerto Rico* matter. Although we do not believe the Court issued an order setting a firm number of acceptable 26(a)(2)(C) witnesses, we do recognize her guidance that ten witnesses per defendant sounded reasonable. *Apr. 10, 2013 Status Conf. Tr.* at 42.

Plaintiffs, and particularly your co-counsel, should have anticipated (and apparently did[3]) the number of 26(a)(2)(C) witnesses that would be involved in this case given the experience in the other Statewide MDL 1358 action and the number of Defendants sued. Furthermore, Plaintiffs concerns about the time left to depose these witnesses are unfounded, and to the extend there is any issues, it is entirely a "problem"[4] of their own creation. Defendants originally

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[2] The number of such designated witnesses was significantly higher in *New Jersey* than it is here. In *Puerto Rico*, fourteen (14) defendants have designated just 35 witnesses – on average, less than three per defendant.

[3] *See Email from M. Axline to L. Gerson* (Nov. 13, 2013) (suggesting early April deadline for disclosure "in light of the number of such witnesses that were disclosed by defendants in the NJ case.").

[4] Defendants do not concede that Plaintiffs need to depose each of the designated witnesses. Many have been previously deposed on the same topics for which their disclosure was made.

proposed that Rule 26(a)(2)(C) designations should be made "not later than 30 days after the deadlines set forth in CMO 110 for the designation of the corresponding experts." *Email from L. Gerson to M. Axline, S. Kauff & W. Petit* (July 30, 2013). Had that proposal been accepted, Plaintiffs would have received Defendants' designations last year. Instead, Mr. Axline responded that Plaintiffs "believe, based in part on our experience in New Jersey, that it would be more efficient to all concerned if we disclose such witnesses after receiving expert reports" and "therefore propose[d] that the CMO be amended to provide that Rule 26(a)(2)(C) witnesses, along with short summaries of their expected testimony, be designated and disclosed no later than 30 days after filing of expert reports addressing the topics on which the Rule 26(a)(2)(C) witness may testify." *Email from M. Axline to L. Gerson, S. Kauff & W. Petit* (Aug. 19, 2013). The delay caused by this request was then compounded by Plaintiffs' multiple requests for expert-related extensions. Defendants cannot be prejudiced in our ability to defend this case because Plaintiffs desire an arbitrary limit on the number of witnesses Defendants may designate and waited until the last three months of expert discovery to raise the issue.

You also state that several defendants have "failed to adequately disclose or produce" the subject matter and reliance materials for our designated Rule 26(a)(2)(C). As indicated above, the parties did discuss the content and scope of such designations last summer. *See Email from L. Gerson to M. Axline, S. Kauff & W. Petit* (July 30, 2013); *Email from M. Axline to L. Gerson, S. Kauff & W. Petit* (Aug. 19, 2013). Mr. Axline suggested that the parties exchange "short summaries of … expected testimony." *Id.* Defendants believe they have provided more than adequate summaries based on the applicable rules, as well as the above mentioned exchange and the precedent established by the parties in the *New Jersey* matter. However, to the extent Plaintiffs still believe that they have not received a proper disclosure for any Rule 26(a)(2)(C) witness, please provide us with a list of those witnesses.

Finally, Defendants would appreciate a response to my February 11, 2014 letter to Nathan Short, in which Defendants seek confirmation on the deadline for the parties' designation of site-specific Rule 26(a)(2)(C) designations. *See Ltr. from L. Gerson to N. Short* (Feb. 11, 2014), at 2 n.1.

Based on the above explanations, Defendants do not believe this issue should be raised with the Court. We look forward to your response.

Thank you,

Lisa A. Gerson

Lisa A. Gerson

cc: All counsel of record by LNFS
Nathan P. Short, Esq.

EXHIBIT F

Damrmtbc

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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In Re: METHYL TERTIARY BUTYL ETHER ("MTBE") PRODUCTS LIABILITY LITIGATION

00 MDL 1358 (SAS)
00 CV 1898 (SAS)

Telephone Conference

----------x

New York, N.Y.
October 22, 2013
2:30 p.m.

Before:

HON. SHIRA A. SCHEINDLIN

District Judge

APPEARANCES

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MICHAEL AXLINE
TRACEY L. O'REILLY

JACKSON, GILMOUR & DOBBS
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NATHAN SHORT

McDERMOTT WILL & EMERY LLP
Attorneys for ExxonMobil
BY: LISA GERSON
STEPHEN J. RICCARDULLI

SHEPPARD MULLIN RICHTER & HAMPTON
Attorneys for ExxonMobil
BY: WILLIAM STACK

SEPULVADO & MALDONADO, PSC
Attorneys for Total Petroleum Puerto Rico
BY: ELAINE M. MALDONADO-MATIAS
ALBENIZ COURET-FUENTES

that if defendants continue to maintain that the depositions of these two individuals are necessary, they are available on the following dates. That is actually next week. We confirmed that we will be taking them next week. So we were surprised to see those being objected to at this point.

THE COURT: And the remaining five?

MS. GERSON: The remaining five are each of the regional coordinators for an area where there is a trial phase.

THE COURT: They are going to give you a declaration saying they have no knowledge regarding MTBE or the trial sites. That is their testimony. To cut to the chase, you can have the two, you can't have the five. You can have the one tomorrow, and the two missing are missing. I'm going right on to the air quality issue.

I read the plaintiffs letter. I don't know that I really have a response to it, so to speak, because you had so many issues to raise in the defense letter. But judging solely from the plaintiffs' letter this issue about lead is just not an issue in this case. Why are the defendants wasting time on an issue that is not an issue in this case?

MR. STACK: Your Honor, William Stack for ExxonMobil. There are two aspects of this. First and foremost, Puerto Rico is not an RFGC.

THE COURT: Correct.

MR. STACK: We know that they are supplied with

conventional gasoline. As your Honor knows from prior cases that you have been involved in, and discovery, conventional gasoline did have some MTBE in it to replace lead and to maintain octane levels. We are seeking basic information concerning knowledge of the commonwealth concerning air quality effects on reducing lead in gasoline.

THE COURT: Why do you need that? This letter convinces me that it is not an issue in this case.

MR. STACK: It is an issue in this respect, your Honor, in that we are at some point going to have to address what benefits they have accrued from the use of MTBE in gasoline, whose only use was to maintain octane and which has been regulated. We have spent some time here today that there are limitations on the percentage of MTBE that can be in gasoline in Puerto Rico because there are limits for vapor controls and gasoline journals and gasoline shipping operations. So it is germane because they were controlling vapor emissions from these large terminals and from these truck loading facilities.

THE COURT: That's fine. That's got nothing to do with what this paragraph seems to be about. They think you're trying to show that MTBE was a better, safer octane enhancer than leaded gasoline. But then they go on to say it wasn't available anyway, lead wasn't available as an octane enhancer during the trial period so lead was not a legally available

substitute. Maybe that is not your point. They think that is your point, that you want to show that there was a choice here. But they are saying there was no such thing, there was no possibility of lead being a legally available substitute at the relevant time period.

MR. STACK: That is correct.

THE COURT: Then I really don't understand the argument of why this is relevant. To cut to the chase, no.

Let's move on to 30(b)(6) regarding natural resources. The plaintiffs' letter says this is just plain overbroad. You are seeking information regarding all natural resources in the commonwealth. You are not even limiting it to trial size, not limiting to it fresh water, which are the only natural resources involved here. This seems to be an overbreadth question.

Then they say that they already produced the sole estimate of groundwater natural resources damages that was previously prepared.

MR. STACK: We have had discussions with plaintiffs' counsel. We have learned from them that they are apparently limiting their claims in this case to groundwater, perhaps some surface water. As a consequence, we were willing to talk to them about the establishment of base lines as well as the extent of natural resource damages in and around the trial site.

EXHIBIT G

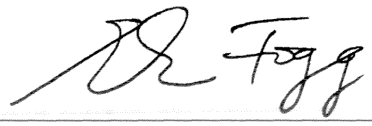
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Master File No. CA 1:00-1898(SAS)
MDL No. 1358

In re: Methyl Tertiary Butyl Ether ("MTBE")
Products Liability Litigation

This Document Relates To: Commonwealth of Puerto Rico v. Shell Oil Co. et al., Case No. 07 Civ. 10470 (SAS)

EXPERT REPORT OF GRAHAM E. FOGG, Ph.D.



Graham E. Fogg, Ph.D.
Carmichael, CA
January 15, 2014

5 Use of MTBE and Sources of Contamination

The following information on the use of MTBE and other common oxygenates [ethyl tertiary butyl ether (ETBE), tertiary amyl methyl ether (TAME) and ethanol] as gasoline fuel additives in the United States comes from information available through the U.S. Energy Information Administration (EIA)[14]:

> Oxygenates were first required in 39 areas of the country with the 1992 wintertime oxygenated gasoline program, arising from the Clean Air Act and designed to reduce emissions of carbon monoxide. This program required oxygen at a minimum level of 2.7 percent by weight (which by volume is equivalent to 15.0 percent MTBE or 7.4 percent ethanol). California obtained a waiver from this minimum 2.7 percent oxygen level because of concerns it would increase automotive emissions of oxides of nitrogen (NO_x). California's requirement was amended to require between 1.8 and 2.2 percent by weight oxygen. The reformulated gasoline program, aimed at reducing emissions of ozone-forming VOCs, nitrogen oxides, and other air pollutants, was implemented year round in certain areas of the United States, and during the summer months in other parts, beginning in December 1994. The program required a minimum of 2.1 percent oxygen by weight (which by volume is equivalent to approximately 11.7 percent MTBE or 5.8 percent ethanol).
>
> MTBE usage as an octane booster grew in the early 1980's in response to the phasing out of lead from gasoline, and an increase in demand for gasoline. The petroleum industry responded to the oxygenated and reformulated gasoline programs by amending gasoline with various oxygenates, principally MTBE and ethanol (Table 5.1). The use of MTBE increased significantly from about 83,000 in 1990 to about 161,000 barrels per day in 1994. MTBE use in gasoline increased to an estimated 256,000 barrels per day by 1997, following the reformulated gasoline program in December 1994 (Table 5.1).

While Puerto Rico did not opt into the reformulated or oxygenated gasoline programs,

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[14] http://www.eia.doe.gov/emeu/steo/pub/special/mtbe.html#Who%20gets%20gasoline%20with%20oxygenates last accessed 2/15/07

EXHIBIT H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Re: Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation	Master File No. 1:00-1898 MDL 1358 (SAS) M21-88

This Document Relates to:

Commonwealth of Puerto Rico, et al.
v.
Shell Oil Co., et al.,
No. 07 Civ. 10470 (SAS)

Expert Generic Report of Marcel Moreau

Marcel Moreau Associates
Portland, Maine

Marcel Moreau

December 6, 2013

IV. What is the MtBE problem, what did oil refiners know during the 1980s and 1990s about the MtBE problem, what steps did the oil marketing industry take to address the problem, and what warnings did the oil marketing industry provide in response to the problem?

The MtBE Problem

MtBE has chemical properties that are significantly different from the constituents of traditional gasoline. It is much more soluble in water, is resistant to biodegradation, and has very low odor and taste thresholds. This means that when gasoline containing MtBE is released into the environment, it will dissolve into and flow with the groundwater (because of its high solubility), will migrate long distances from the source (because soil bacteria will not easily degrade it), and will be readily detected in water supplies by consumers (because of the low odor and taste thresholds). MtBE's high solubility and mobility combined with its low odor and taste thresholds means that even a very small quantity of product that enters the environment from an UST system has the potential to cause significant problems with nearby water supplies.

In contrast, ethanol, another compound that can be used as a fuel oxygenate, biodegrades rapidly. For this reason, even though ethanol is completely miscible in water, it does not pose nearly as great a threat to groundwater quality as MtBE. This is because it will be removed from the environment through biodegradation before it can migrate very far from the source of the release.

For most of the twentieth century, the petroleum marketing industry had adopted a rather cavalier attitude towards small-volume gasoline leaks and spills. Small leaks from storage systems and spills associated with delivery activities, equipment maintenance, and vehicle fueling were very common and caused little concern.[173] Because the components of traditional gasoline were relatively insoluble and biodegraded fairly readily, these types of leaks and spills only rarely caused significant contamination incidents.

[173] "Underground Monitoring," letter to T. M. Harvey of Gilbarco from Glen Marshall of Shell, with attachments, April 25, 1989.

Specific topics for review included toxicity, the effect on vehicle emissions, and the effects of oxygenates on groundwater. The formation of this broad-based committee within API is indicative of widespread concern among API members regarding the benefits and hazards posed by MtBE use.

July 30, 1987 – Exxon Briefing Paper States Tank Leaks Pose Special Problems with MtBE

In July 1987, Exxon produced a briefing paper that was intended to be used to inform legislators, news reporters, and others on the issues surrounding the different oxygenated fuels.[294] The briefing paper described numerous issues associated with ethanol, methanol, and MtBE, covering topics such as growth as a motor fuel, environmental claims, energy security, problems as a vehicular fuel, consumer reaction, supply/distribution, and mandated use.

Comparing the various oxygenates, the briefing paper made it clear that MtBE had fewer issues with regard to use as a vehicular fuel, consumer reaction, and supply/distribution than ethanol or methanol. The briefing paper did note that, "Underground storage tank leaks pose special problems because MTBE is highly miscible and would spread rapidly if it encountered water in the soil…MTBE is detectible (sic) to smell and taste at very low levels."[295] The briefing paper also noted that, "EPA is currently studying the problem."[296]

In deposition testimony, Sully Curran noted that the briefing paper was intended to provide background for Exxon employees who might speak with regulators or any other outside personnel regarding oxygenated fuel issues.[297] Mr. Curran did not recall ever distributing the actual document, but he stated that he used the information in the briefing paper, "…orally on many meetings that I was involved with with regulators and

[294] "Briefing Material – Oxygenated Fuels," internal Exxon memo from Carl B. Raglin to R. P. Larkins, July 30, 1987, with attachment.
[295] Ibid., p. 10
[296] Ibid.
[297] *De Bene Esse Deposition* of Sullivan Curran, In re MTBE Products Liability Litigation, State of New Hampshire v. Hess Corporation, et al., Volume 1, March 8, 2011, p. 220.

November 15, 1990 – Clean Air Act Amendments are Passed

The 1990 Clean Air Act Amendments recognized that fuel composition needed to be addressed in order to provide further improvements to air quality.[328] Two programs were established:

- A winter oxygenate program (to go into effect November 1, 1992) designed to curb carbon monoxide emissions by adding oxygen molecules to the fuel to improve combustion
- A reformulated fuels program (to go into effect on January 1, 1995) designed to curb ozone levels in urban areas

An EPA document entitled, *Origin of the Reformulated Gasoline Program*, provides background on how MtBE came to be so widely used in gasoline.[329] In the late 1980's, agencies responsible for air quality were investigating the potential for non-petroleum fuels such as methanol to reduce automobile emissions and improve air quality. One issue with these fuels was that they were not compatible with the existing fuel storage and dispensing infrastructure or the existing automobile fleet.

In 1989, ARCO, a major manufacturer of MtBE, had begun to market a gasoline blended with MtBE as a replacement for leaded gasoline that would also improve automobile emissions. During discussions of the Clean Air Act Amendments in 1990, the petroleum and oxygenate industries proposed that MtBE could be used to improve air quality.[330] One advantage of MtBE was that it could be used with the existing fueling infrastructure and automobile fleet, so the air quality benefits could be realized much more quickly. The final Clean Air Act legislation set emission requirements for gasoline and also included a mandate for gasoline to contain a minimum amount of oxygen. The two most viable oxygenate compounds for use in fuels were ethanol and MtBE. MtBE became the oxygenate of choice among the major oil refiners for most of the country.

[328] *Vehicle Fuels and the 1990 Clean Air Act*, EPA 400-F-92-015, Fact Sheet OMS-13., August, 1994.
[329] *Origin of the Reformulated Fuels Program*, EPA 420-F-95-001, April 1995., April 31, 1995.
[330] Ibid.

used in reformulated gasoline come from renewable sources.[356] This provision essentially would have forced the petroleum industry into blending ethanol into gasoline because MtBE did not come from renewable sources. Not satisfied with being able to use MtBE for 70 percent of the oxygenate required by the Clean Air Act Amendments, the API and the National Petroleum Refiners Association (NPRA) filed suit against the EPA on the grounds that the EPA lacked the authority to require that a percentage of the oxygenate be "renewable."[357] The oil industry eventually won this suit. Thus, industry claims that the EPA "required" the use of MtBE are disingenuous. In fact, the oil industry fought for the right to use MtBE, and only MtBE, to meet the oxygenate requirements of the 1990 Clean Air Act Amendments.

March 1994 – MtBE Groundwater Contamination Has Occurred and Will Occur in the Future

On March 10, 1994, Ken Darmer, a Shell toxicologist in Shell's Product Safety and Compliance department, wrote a memo summarizing a meeting of the "MTBE Task Force" an industry group which had been charged with overseeing the health effects testing of MtBE. Among the Task Force recommendations was the formation of an "MTBE Product Stewardship Task Force" to provide "ongoing support of MTBE…in light of the many unresolved issues."[358] The memorandum also stated, "Groundwater contamination by gasoline containing MtBE has occurred and likely will happen in the future."[359]

[356] "Regulation of Fuels and Fuel Additives: Renewable Oxygenate Requirement for Reformulated Gasoline," 40 CFR Part 80, August 2, 1994.
[357] Decision document for American Petroleum Institute and National Petroleum Refiners Association v. United States Environmental Protection Agency and Carol M. Browner, Administrator, United States Environmental Protection Agency, United States Court of Appeals for the District of Columbia Circuit, No. 94-1502, April 28, 1995.
[358] *Summary of 8 March 94 MtBE Task Force Meeting,* internal Shell memo from K.L. Darmer to J.C. Willett, March 10, 1994.
[359] Ibid .